

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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 In re: VEHICLE TRACKING AND) MDL No. 11-2249 (DWF/SER)
 SECURITY SYSTEM ('844) PATENT)
 LITIGATION)

)
) St. Paul, Minnesota
 This Document Relates to) December 15, 2011
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)

BEFORE **THE HONORABLE DONOVAN W. FRANK**
 UNITED STATES DISTRICT COURT JUDGE
 AND BEFORE **THE HONORABLE STEVEN E. RAU**
 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

PRETRIAL CONFERENCE HEARING

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IN OPEN COURT

IN OPEN COURT

THE HONORABLE JUDGE DONOVAN FRANK: You may all be seated. Thank you. We would like to welcome you all here this afternoon. I am Donovan Frank. And you are, sir?

THE HONORABLE MAGISTRATE JUDGE RAU: Judge Rau.

THE HONORABLE JUDGE DONOVAN FRANK: We will see as the next hour or so goes by, and I realize there's approximately seven individuals on the phone, and we will do a rolldial here in just a few moments.

We have the proposed agenda. We have added a couple of items to it. And I garner substantially from some of the things that worked in the -- well, primarily the Guidant case, more than the North Star case MDL -- the Guidant case is almost over to the extent I actually issued an order this past week on what else, other than attorney fees and expenses.

So, the focus of this today will probably be -- we are going to try to be listeners for a significant time to find out what, perhaps, people agree on, what they don't agree on. And we will probably have to be convinced that we shouldn't set another get-together about six weeks out -- it could be less than that, four. It could be a bit more than six, rather not have it more than that.

1 What has worked well for us in the past is having
2 due regard for costs and economies of scale and such issues,
3 which is a primary justification for cases going into an
4 MDL. If we can't help the clients and the lawyers save
5 money and time, then that is the primary justification for
6 MDLs, whether it is a class action model or a bellwether
7 trial model or some combination of those. Then it seemingly
8 defeats the purpose of it.

9 What worked well, and so we will probably try to
10 get your feedback today, is whether there should -- whether
11 there are reasons not to do the following. Once we go
12 through this agenda, and we have added a few items to it,
13 getting together approximately every four to six weeks,
14 primarily in person, unless there's some compelling reasons,
15 and then we will talk about liaison and lead counsel issues
16 in the issue, because of cost issues, representation issues.

17 What really worked well was to -- we would get
18 together off the record in my chambers for an hour, whether
19 it was -- I will just -- generally, it would be 8:30 to 9:30
20 and then we would go into the courtroom like we are now at
21 9:30. These dates were set well in advance.

22 And for the -- in chambers, we had nobody on the
23 telephone. My good friend and colleague, Eldon Fallon down
24 in New Orleans, with all of the technology we have, they
25 have got even more down there, but probably they need it

1 with the larger MDLs he now has.

2 Then we come out of the courtroom, but rather than
3 the normal motion practice, we had a letter system set up so
4 parties would send in a proposed agenda. And if they wanted
5 contested issues addressed in the courtroom, whether it was
6 a discovery issue or some other pretrial issue in the case,
7 we had a letter system set up that everybody got notice X
8 number of days in advance, so everybody knew exactly what
9 would be going on in the courtroom.

10 And then we did what we will probably do in this
11 case, we put the case on our website so people can go to our
12 website anytime they want. If you went there now, you would
13 see the different MDLs that we have. So anybody can see,
14 whether they were here or not, what is happening.

15 Our case was a little bit different because we
16 were the first case that had gone to all electronic filing
17 when the manual and complex litigation had not dealt with
18 that issue.

19 So, our hope is to discuss today, mostly in a
20 listening capacity, what timelines -- I will confess to you
21 that while Judge Rau and I have discussed it, we have two
22 law clerks in the room. And one of my lawyer/law clerks,
23 Ms. Lisa Converse and I have been together for some time. I
24 assumed when I reviewed the case and a memo from the MDL
25 Panel, and some of you really are going to confirm or

1 disabuse us of that this afternoon, that at some point a
2 global Markman hearing might be in the best interests of all
3 parties, with or without an issue of representative claims.

4 Those of you familiar with our District know that
5 each of the Judges in our District have a significant number
6 of patent cases. So, we haven't adopted the specialization
7 model, because on any given year we each have 10 or 12 cases
8 each. And so, we are frequently busy with patent work.

9 So, we will find out today, perhaps, unless it is
10 premature to be inquiring, well what would most help
11 plaintiff and defendants with respect to issues that might
12 help you focus the case or resolve it early on, with or
13 without settlement discussions? Are there some big ticket
14 items that if we agreed to, whether it was stay the
15 discovery or some other issue, well if we could just focus
16 in and get a ruling from the Court this would really help
17 everyone. Those are typical issues, as you well know, that
18 are discussed in a non-MDL context, as well.

19 In terms of division of labor between the two of
20 us, if you were to ask me how much work Chief Judge -- Chief
21 Magistrate Judge Art Boylan did on Guidant, I did everything
22 except the settlement. He was involved with that, and then
23 we had another Special Master the parties selected, who I
24 became good friends with, Pat Juneau out of New Orleans, or
25 Louisiana, who worked with Judge Boylan.

1 And so, those issues -- whether or not that model
2 will work for this case, Judge Rau and I can make some of
3 those decisions so everybody knows where we are at early on
4 in the case. That is probably more than I intended to say.

5 I would like to take, out of respect to each of
6 you, your clients and the folks on the phone, to take
7 rollcall, unless you would like to make any comments
8 initially, Judge Rau.

9 So, why don't we first take the individuals in the
10 courtroom?

11 I will indicate to you, we will see if it comes up
12 as we go down the road, not today, with the technology that
13 we have in St. Paul, because they don't have yet quite the
14 same technology in Minneapolis. There are three cameras in
15 here and a 10 X 12 screen that will come out of there for
16 those of you that haven't tried cases in here since we moved
17 back in here.

18 And we do have the capability of putting people on
19 the screen from all over the world, because we are fully
20 connected, both the telephone system, the computers, and the
21 video system is fully connected in here. And if you were to
22 ask us, well, do we allow lawyers to appear by video
23 conference for dispositive motions? Because in our
24 District, for those of you that are local, we still have
25 oral argument in all dispositive motions. The answer is no.

1 And most people don't request that. They usually appear.

2 But, in an MDL context, I know that Judge Fallon
3 and other judges are being tested to try to make it
4 efficient, but fair for all of the parties and their
5 clients, but hold down the costs.

6 So, we will have to see as time goes on whether
7 that would seem to make any sense and be fair to everyone
8 without any prejudice. But, we do have the technology to do
9 that.

10 Why don't we begin with introductions? We will go
11 from -- well, I will just start from my right, your left,
12 and we will walk across the room. And then without
13 knowing -- if you are at counsel table and there is someone
14 not at counsel table who either you want to introduce, or
15 have them introduce themselves, feel free to do that. And
16 then we will go from that to the individuals on the phone.

17 I realize my Calendar Clerk, Ms. Schaffer, took a
18 rollcall. And we have a seating chart here. But, just for
19 the record, so we have it by my court reporter, we will make
20 sure that everybody for the record is -- we note who was
21 present and accounted for. So, we can go over to this side
22 of the courtroom. Whenever you are ready?

23 MS. CIANO: Thank you, Your Honor.

24 Karin Ciano, standing in for Alan Anderson of the
25 Alan Anderson Law Firm, on behalf of plaintiffs. To my

1 right is Connie Merriett of Farney Daniels LLP, also on
2 behalf of plaintiffs.

3 THE HONORABLE JUDGE DONOVAN FRANK: Good
4 afternoon.

5 MR. WILLIAMS: Good afternoon, Your Honor. Doug
6 Williams, and my partner Felicia Boyd, Barnes & Thornburg.
7 And would you like us all to identify the individual
8 defendants that we are appearing on at this point? We have
9 provided that to --

10 THE HONORABLE JUDGE DONOVAN FRANK: Why don't
11 we -- if we have any questions -- because I know we have
12 that, unless one of you feels strongly that you should do
13 that, unless an issue comes up, why don't we forego that at
14 this time, since we have a fairly large number of individual
15 defendants?

16 MR. WILLIAMS: Thank you, Your Honor.

17 MR. HILL: Good afternoon, Your Honor, Steve Hill
18 from Hill Kertscher & Wharton in Atlanta, Georgia.

19 THE HONORABLE JUDGE DONOVAN FRANK: Now, are you
20 surprised we didn't have much snow on the ground when you
21 came in?

22 MR. HILL: Very. But, it is colder here than it
23 was in Denver earlier this week.

24 THE HONORABLE JUDGE DONOVAN FRANK: I suspect it
25 was -- is.

1 MR. ARNETT: Good afternoon, Bob Arnett of the
2 Munck Carter Law Firm in Dallas, Texas.

3 MR. LEE: Your Honor, Bob Lee, with Alston & Bird,
4 also from Atlanta, Georgia. And with me is my co-counsel.

5 MR. BREMER: Dennis Bremer of Carlson Caspers
6 VandenBurgh & Lindquist, Your Honor.

7 THE HONORABLE JUDGE DONOVAN FRANK: Good
8 afternoon.

9 MR. RUSNAK: Good afternoon, Your Honor, Eric
10 Rusnak from K & L Gates.

11 MS. LAWRENCE: Good afternoon. Erin Lawrence from
12 Frommer Lawrence & Haug from New York.

13 MR. NICHOLS: Good afternoon, Your Honor. James
14 Nichols of Dorsey & Whitney, Minneapolis.

15 MS. BORST: Good afternoon, Your Honor, Laura
16 Borst from Fulbright and Jaworski in the Minneapolis office.

17 MR. CUNNINGHAM: Good afternoon, Your Honor. Tom
18 Cunningham from Brooks Kushman in Michigan.

19 MR. FLOREY: Good afternoon, Your Honor, Michael
20 Florey of Fish & Richardson, Minneapolis. And I will
21 identify my client, Xata Corporation. We are the Minnesota
22 company that is involved in this. And so we are part of the
23 reason that you got this wonderful MDL.

24 THE HONORABLE JUDGE DONOVAN FRANK: Now, I will
25 tell you, the one exception to random assignment is a judge

1 when he or she gets the call can give a yes or give a no.
2 So, some people would say, well, you actually voluntarily
3 said yes to a patent case? And actually somebody can take
4 my temperature when it is over, I suppose. But, actually, I
5 have had all good experiences with MDLs. Because I have
6 been asked -- and most of you know how that works. You can
7 give a simple yes or no. And I know there was at least one
8 Judge in Texas who was also willing to take it. And some
9 folks thought the case should have been there, some here.
10 And the MDL Panel has the expectation that we will try to be
11 fair to everyone so that we don't by the mere location of it
12 run up the expense, prejudice or inconvenience, because of
13 the location of the Transferee Judge.

14 Why don't we take the rollcall on the phone? I
15 believe I have -- maybe it is easier if I name a name first,
16 since I have a chart, so that everybody doesn't speak at
17 once, if that is acceptable to everyone. I am assuming
18 there is a Mr. Bradley on the phone?

19 MR. BRADLEY: Yes, William Bradley, from Roylance
20 Abrams in Washington, D.C..

21 THE HONORABLE JUDGE DONOVAN FRANK: Good
22 afternoon. I am assuming there is a Mr. Cleveland on the
23 phone?

24 MR. CLEVELAND: Yes, Your Honor, Joe Cleveland, at
25 Brackett & Ellis, in Fort Worth, Texas.

1 THE HONORABLE JUDGE DONOVAN FRANK: And I might
2 mispronounce the name. Is there a Mr. Weikert or Weikert on
3 the phone?

4 MR. WEIKERT: Yes, Your Honor, it is Rob Weikert
5 with Nixon Peabody in San Francisco.

6 THE HONORABLE JUDGE DONOVAN FRANK: Is there a Mr.
7 Cutler on the phone?

8 MR. CUTLER: Good afternoon, Your Honor. Matt
9 Cutler from Harness Dickey in St. Louis, Missouri.

10 THE HONORABLE JUDGE DONOVAN FRANK: Is there a Mr.
11 Crowe on the phone?

12 MR. CROWE: Yes, Your Honor. Dan Crowe with the
13 Bryan Cave Law Firm, also in St. Louis, Missouri.

14 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Furth?

15 MR. FURTH: Yes, Your Honor, it is Tom Furth from
16 Kudman Trachten & Aloe in New York.

17 THE HONORABLE JUDGE DONOVAN FRANK: And I will
18 probably mispronounce the name. Is there a Mr. Sauz,
19 S-a-u-z?

20 MR. SAUZ: Yes, Your Honor. Jimmy Sauz from
21 Hankin Patent Law, in Los Angeles.

22 THE HONORABLE JUDGE DONOVAN FRANK: Good afternoon
23 to each of you. We have an agenda that was proposed,
24 substantially, by one or more of the counsel.

25 The only addition in the printed version that was

1 out was we added the "lead counsel issues" phrase. It might
2 have more appropriately been described as lead and liaison
3 counsel issues. I suppose we could have had the laundry
4 list of steering committee, coordinating committee and the
5 like. But, absent a compelling reason to do otherwise, I
6 thought we would go right down the list of proposed agenda
7 items, see what the respective views are of each of you.
8 And then to the extent there is any consensus by one or more
9 of you, we certainly want to know that. And then as you are
10 going down the list, I guess I will leave it to counsel if
11 there are one or more issues where with or without consensus
12 we group a couple of these together so we don't go back and
13 forth too much, because some of these may lend themselves to
14 that, some not.

15 We will have a few issues we will add at the end,
16 unless they come up in our discussions. And then as you
17 discuss any issue, if you have some strong views about,
18 well, we don't think much of the idea of getting back
19 together in four to six weeks, my goal is to give you a date
20 and time before you leave today. And then whether we ought
21 to consider something other than an in-person meeting, but I
22 always find those most productive, depending upon how we set
23 it up, depending on who is going to be at those meetings, we
24 generally have those in chambers down the hall.

25 And then my goal was today, after Judge Rau and I

1 talked, was to strongly suggest that prior to that date,
2 assuming we get together in some form, that we require a
3 proposed case management agenda be submitted by one or more
4 parties so we can see, one, what parties agree on, whether
5 it is timelines, deadlines, issues, those typical things
6 that would be discussed in a scheduling order.

7 And then, one, whether there is any consensus on
8 how we should proceed. And two, whether we agree with the
9 consensus. Because I think meaningful dates properly
10 spaced, that is one thing an MDL has in common with
11 standalone cases. Most experienced lawyers know as well or
12 better than a judge, meaningful dates, meaningfully spaced,
13 are what get things done in an efficient but fair manner.

14 So, to the extent it is important to anyone, I am
15 a fairly strong believer in the bellwether trial system.
16 And that may not be -- as opposed to a focus on claim
17 construction issues.

18 And as you can see by our -- I'm getting a little
19 ahead of ourselves here, but in our Local Rules, much like
20 the Northern District of California and Texas and other
21 areas, we have a whole claim chart process, and put a number
22 of things together. I can probably tell you in advance, we
23 are not going to have 150 claim charts submitted to the
24 Court.

25 THE HONORABLE MAGISTRATE JUDGE RAU: Or Markman

1 hearings.

2 THE HONORABLE JUDGE DONOVAN FRANK: Pardon? Or
3 separate Markman hearings. But, it may be premature to
4 discuss that today. We will know more if we have the -- and
5 I have my to do list here, but if we get a proposed initial
6 case management order from one or more of you, we will know
7 early on so we can move this case down the road; but, do it
8 in a fair manner that seems to make sense to all of you with
9 the appropriate motion practice.

10 So, with that kind of as the background, and this
11 agenda that is there, who would like to step off the curb
12 first, so to speak? You know, we are not wed to whether the
13 plaintiff steps to the mike first or the defense. It might
14 make the most sense to have plaintiff come to the -- pardon
15 me?

16 (Discussion off the record.)

17 Oh, Mr. Williams, you got Judge Rau's attention,
18 not mine. So why don't you step to the podium, first?
19 Unless there is an objection to that by counsel?

20 MS. MERRIETT: None at all, Your Honor.

21 THE HONORABLE JUDGE DONOVAN FRANK: All right.

22 MR. WILLIAMS: Thank you, Your Honor.

23 THE HONORABLE JUDGE DONOVAN FRANK: I don't see
24 anybody else jumping up, so --

25 MR. WILLIAMS: Ms. Merriett indicated that since

1 this is an item the defense group had put on the agenda,
2 that she thought that we should address that first.

3 THE HONORABLE JUDGE DONOVAN FRANK: All right.

4 MR. WILLIAMS: But, before I begin, I do need to
5 say thank you to Ms. Schaffer who has really, really been
6 very helpful to us all at this point. So, on behalf of all
7 of the folks that have appreciated the fact that she has
8 really made it a lot easier for us, I just wanted to send
9 her that thank you.

10 THE HONORABLE JUDGE DONOVAN FRANK: Well, thank
11 you. And I will make sure I pass it on. And I should tell
12 you, some of the lawyers who practice here know this, even
13 from the Miles Lord's day, because that was even true before
14 the total remodel. All of these mikes are piped back
15 into --

16 MR. WILLIAMS: I did not know that, Brenda.

17 THE HONORABLE JUDGE DONOVAN FRANK: So she is
18 probably listening as we speak. I will just tell you one
19 brief story, and I say it -- it has actually happened to me
20 in a trial, but the more interesting stories are in the days
21 of Judge Lord when certain lawyers would know about the mike
22 system and they would say things like the following: I
23 don't know why you are saying those nasty things about Judge
24 Lord. I think he is the greatest thing on the face of the
25 earth. And then it would go on, because that particular

1 lawyer knew that somebody was listening in the back. And
2 the story goes that Judge Lord would insist that one of his
3 staff listen. I have never asked anybody to do that. But,
4 they will -- everybody but the Judge has a speaker on their
5 desk, and they can hit whatever courtroom they want. So,
6 she may have heard what you just said on behalf of everyone.
7 It is probably quite likely.

8 MR. WILLIAMS: And it had nothing to do with the
9 fact that Christmas is right around the corner.

10 Your Honor, number one, the number and status of
11 the cases transferred into the MDL at this point, I think
12 Your Honor that the pot is ripe, so to speak, with respect
13 to all of the cases that were initially filed, the eight
14 cases that were around, and then the D.J. action that I had
15 filed initially on behalf of Qualcomm and a large group of
16 other folks that were here.

17 Since that time there has been a number of
18 settlements --

19 THE HONORABLE JUDGE DONOVAN FRANK: That is true.

20 MR. WILLIAMS: And they have been fairly
21 consistent as they have come through. And so we are still
22 in the process of trying to actually get a handle on exactly
23 where we stand with those settlements. I think there are a
24 few more about to take place and to be filed. So, we will
25 try to keep the Court apprised of those as quickly as they

1 do get resolved, to file those notices of withdrawal and the
2 settlement agreements.

3 But, having said that, there has been a couple of
4 other developments that I think are awfully important for us
5 to call to your attention, and for which I don't believe
6 there is an agreement. PJC has filed two actions, one in
7 California and one in Delaware, against the automobile
8 manufacturers. So, we have got our truck transport cases
9 and the suppliers here that supply products and services to
10 the trucking industry in that initial group of cases. And
11 then the same patent is involved with respect to some
12 automobile manufacturers, Delaware, California.

13 We have not reached an accord on our side, but
14 there is a general discussion that has been that we see no
15 reason why those shouldn't be treated separately and why
16 they shouldn't be brought in here, so that we don't end up
17 with claim constructions coming from Delaware, coming from
18 California, and coming from here that guaranty that when we
19 get to the Federal Circuit, somebody is doing this, and we
20 are all back together somewhere else.

21 THE HONORABLE JUDGE DONOVAN FRANK: Well, then if
22 you add to that a 60 plus percent reversal rate, at the
23 Federal Circuit level -- I say that respectfully.

24 MR. WILLIAMS: I didn't even hear that comment,
25 Your Honor. So I say nothing on the record about the

1 Federal Circuit. Love them, love them dearly. Wonderful
2 people.

3 THE HONORABLE JUDGE DONOVAN FRANK: But, it is in
4 that --

5 MR. WILLIAMS: It makes sense.

6 THE HONORABLE JUDGE DONOVAN FRANK: It is in that
7 neighborhood.

8 MR. WILLIAMS: Yes. And it makes sense that we do
9 what we can to try and minimize that. And I believe I have
10 at least one call from one of the representatives of car
11 companies. Just this week I believe they filed their notice
12 of appearances, so there will be some lawyers that I think
13 will be checking in on that.

14 And it may be that there will be a specific
15 request by one of the car companies to join this process. I
16 have looked at the rules before, because I have got another
17 one of these on behalf of Qualcomm in the Southern District
18 of Ohio, Your Honor, before former Chief Judge Beckwith,
19 there, in Ohio, where a couple of cases were brought on.
20 And Judge Beckwith there, I believe, on her own had
21 contacted the MDL and said it looks like these have been
22 filed. It would make some sense for this to be considered,
23 and those were sent in as tag-along cases. So, I do believe
24 the Court has the ability to do that on its own initiative.
25 And then however else the MDL Panel might come across that

1 information, they have the power to do so, themselves.

2 THE HONORABLE JUDGE DONOVAN FRANK: Then there is
3 the issue, if you look at a number of MDLs across the
4 country, one of the issues discussed at a hearing like this
5 or the next one so it gets into the order is an issue on
6 deadlines on joinder. In other words, well, it could take a
7 couple of different avenues. But I guess you are right,
8 part of it is going to be the Panel's position, part of it
9 will be what are the individuals going to do in each of
10 these other cases, as well.

11 Because I would think that everyone would benefit,
12 with or without agreement, sooner, rather than later,
13 regardless of which court or courts are doing it, you get an
14 up or down on, well, are they all coming in here or are they
15 not? So we can move on and not have three -- well, I have
16 usually set up a pre-Markman hearing, apart from all of the
17 claim chart activity and discovery, and then get an order in
18 place. But to have three of those going at once, it is
19 difficult to understand how that would benefit any of the
20 clients, any of your clients on either side of the runway.

21 So, what do you propose this Court do?

22 MR. WILLIAMS: I think that it would make eminent
23 sense, personally, for those cases to be joined. But, I
24 speak technically on behalf only of those defendants that I
25 represent. And quite frankly, I have not gotten a

1 consistent view back from them -- let me say this. I have
2 not gotten back opinions yet on where everybody stands on
3 the issue. But, speaking as a student of this process, I do
4 think that it makes eminent sense personally, as a lawyer,
5 that we would do this in one court, so that when we did go
6 to the Federal Circuit, we could take all of the different
7 positions that may come and everybody will be given that
8 same voice. That we go up there and get it sorted out as to
9 what they would like to see all of these claims mean before
10 we split and go back to multiple courts around the country.

11 And before I relinquish the podium, Your Honor,
12 for the plaintiff to comment on what their feelings are on
13 this, I did want to say a little bit about the procedure
14 that we sort of talked about on our side of the table before
15 we came in.

16 THE HONORABLE JUDGE DONOVAN FRANK: Fair enough.

17 MR. WILLIAMS: I have been asked to speak on
18 behalf of the group, but our defense group that is formed
19 here, we do have a difference of opinions and very different
20 needs. So, there are going to be a couple of different
21 lawyers I will ask the Court to listen to on a couple of the
22 different points, as we get to them on there. But, we have
23 met, and we have worked really hard at trying to get as much
24 common points as we could in this process. But, there is a
25 great deal of diversity with the nature of the kinds of

1 defendants from small technical companies to large trucking
2 companies to intermediate-sized trucking companies. There
3 is no way that we can really get common on all of those
4 issues, but we are going to do our darnedest to get there,
5 number one. And number two, to be as brief as possible
6 where we do have different points to raise with the Court,
7 so when we get to a couple of individual points, I want to
8 introduce some folks to Your Honor to have them speak to
9 specific issues on the agenda.

10 THE HONORABLE JUDGE DONOVAN FRANK: And if we
11 could get their names -- we don't have to have them during
12 the hearing or before the day is out but, of the assigned
13 judges and the courts in these other cases. Because I think
14 that apart from the respective view of counsel, judges have
15 the responsibility to reach out to one another. And we each
16 have to do what we have to do. But, there should be some
17 communication.

18 So that, for example, if a judge in California is
19 saying: Well, I have got a motion they are going to tee up
20 in front of me in X number of days. Can we tie in this? Or
21 I will just give you an easier example. When we had
22 approximately 20 state cases filed here in the
23 Guidant/Boston Scientific case, Art Boylan and I took a walk
24 up the street to the Ramsey County Building and said, we
25 need to coordinate who is going to go first with their cases

1 and we will coordinate our discovery together, but we can't
2 play one side off against the other. So, we coordinated it
3 together with Judge Cleary, and myself, here.

4 This may be a different issue, but at least I have
5 some responsibility to check in to see, well, is there a
6 motion coming? And maybe some of you will know that. Is
7 there something teed up there? Or is there -- during the
8 recent case I had, somebody said, well, somebody tell Judge
9 Frank we have stayed our case out in Michigan until he
10 decides an issue -- not in this case, of course. So, at
11 least if I can get the name of the courts, if not the judges
12 assigned. And of course, I will -- anything that I am told
13 or I tell, I will disclose to the parties. So --

14 MR. WILLIAMS: Your Honor, I will see that you get
15 that by the beginning of the week at the latest.

16 THE HONORABLE JUDGE DONOVAN FRANK: That is fine.

17 MR. WILLIAMS: And I will also include the two car
18 cases, the Delaware case and the California case.

19 THE HONORABLE JUDGE DONOVAN FRANK: Those are the
20 ones that I -- yeah, all right.

21 MR. WILLIAMS: With that, Ms. Merriett?

22 MS. MERRIETT: You know, I am thinking it doesn't
23 make a whole lot of sense to hop up and down. And if I
24 could argue from here, that way we are not going up and down
25 on every single agenda item, it might make more sense.

1 THE HONORABLE JUDGE DONOVAN FRANK: As long as you
2 can speak into the microphone, I can --

3 MS. MERRIETT: I can do that.

4 THE HONORABLE JUDGE DONOVAN FRANK: -- handle
5 that.

6 MS. MERRIETT: Can you hear me?

7 THE COURT: That is fine.

8 MS. MERRIETT: Well, I think there might be a
9 slight oversimplification of the car cases and the
10 similarity and what the inclusion of large companies, such
11 as General Motors and Hyundai and Kia, you know, in the
12 California case, in this matter.

13 And we just haven't reached that matter because we
14 aren't before the Panel and I haven't met with all of the
15 opposing counsel. I have met with some of them in the case.
16 And they don't have positions yet on whether they want to
17 join the MDL or not. Some of them do. Some of them don't.
18 It is not quite ripe. And the group here, that was similar
19 before when we got before the JPML, are now different. And
20 including the similarities between them were, I thought,
21 that these are telematics devices, they are trucking
22 devices. They track the trucks that go, where they are
23 going, where they are proceeding. And the automobile
24 manufacturers have more of like an OnStar type device that
25 is more the emergency vehicle response system. And have

1 willfulness issues in those cases that would extensively, I
2 mean, muddle discovery in this case.

3 I mean, the idea for the MDL was that we were
4 going to -- you know, efficiency, and uniform positions.
5 And now that we are here, I am finding that the MDL case,
6 the car manufacturer cases are in different notice periods,
7 and are much more involved. And I know how familiar you are
8 with the *Mansell versus Raytheon* case with the Texas Judge
9 who has previously construed these claims and previously
10 issued a Markman Order on those claims where the Judge was
11 interpreting the scope of a license, and had interpreted the
12 scope of the claims to see if the products applied to the
13 license. So, we have already got one Markman Order out
14 there that will be different -- may -- would likely be
15 different than the Court's.

16 THE HONORABLE JUDGE DONOVAN FRANK: Are you
17 talking about Judge Barbara M. G. Lynn, is that the case?

18 MS. MERRIETT: Judge Lynn, yes.

19 THE HONORABLE JUDGE DONOVAN FRANK: Judge Lynn?
20 Is that who you are talking about? Okay.

21 MS. MERRIETT: That was a breach of contract
22 issue. But, they had to interpret the claims to determine
23 the scope of the license, right? So, we have that Markman
24 out here. We have got General Motors and larger companies,
25 but of the defendants here, there are only 14 manufacturing

1 defendants -- only -- as far as I know to date, only one
2 manufacturer or supplier is located in Minnesota, which is
3 Xata.

4 And we have 49 trucking companies in the case,
5 with a total of 64 parties. And I think that number may
6 drop significantly. And we bring in large companies, large
7 car cases, yet these devices are used differently for the
8 two companies.

9 So, although I am not necessarily stating now that
10 we would be opposed to joining the MDL, we just haven't had
11 enough time to meet with their defense counsel, decide
12 whether they want to, you know, if they want to be included
13 in this, because the issues might very well be different.
14 And it is not quite ripe. And I am not taking a position
15 necessarily one way or another. I am just stating that it
16 may be an oversimplification, and easy to jump and say, yes.
17 But, the willfulness issues are dramatically different.

18 THE HONORABLE JUDGE DONOVAN FRANK: Is it the '844
19 Patent?

20 MS. MERRIETT: It is.

21 THE HONORABLE JUDGE DONOVAN FRANK: And you know,
22 I think, of course there may be an issue that might be
23 premature, or maybe not to ask about, and I couldn't hold
24 parties to it in any event, and that is whether it is likely
25 some of the same terms will be involved. But, that aside,

1 one of the things that I was probably going to ask about,
2 and you may be suggesting, is whether there is any agreement
3 with how you characterized some of the issues or not.

4 It sounds like one or more groups of individuals,
5 some of whom are not here, are maybe going to head to the
6 MDL Panel and say, this should be MDL, it should be joined
7 with the case in Minnesota. That looks like some -- one or
8 more companies or lawyers may do that?

9 MS. MERRIETT: It is my understanding that yes, at
10 least one of the companies -- my understanding is one of the
11 car companies does want to join the MDL. The other car
12 companies with which I have met the counsel for, they are
13 not sure. They are mulling it over. I mean, it is just too
14 soon. It is premature to jump to that conclusion. And it
15 would slow things down.

16 I mean, we filed these cases long ago. And we
17 finally are here and we are finally before the MDL. And
18 with the tagalong cases and the objection period, it slows
19 us down another 30 days. And, you know, it might be
20 important to look at the difference in discovery issues and
21 that the devices are not similar.

22 I mean, the accused devices are not similar enough
23 to warrant joining this particular action. And we do have
24 claim construction orders out, out on this that aren't
25 necessarily binding on this Court --

1 THE HONORABLE JUDGE DONOVAN FRANK: Right.

2 MS. MERRIETT: But the emergency vehicle response
3 systems are very different than tracking the trucks. And
4 most of these companies are nowhere near the size of a
5 General Motors. And I think that it might -- but, I am, you
6 know, reserving the right to say that I am not saying I am
7 not amenable to it. I need to discuss it with opposing
8 counsel. We were not necessarily objecting to it. We are
9 just saying it is just a little premature to make that
10 decision and jump on that bandwagon, because I know that
11 there are some significant discovery issues for those car
12 companies that were in the *Mansell Raytheon* suit that would
13 really make this different.

14 THE HONORABLE JUDGE DONOVAN FRANK: It sounds
15 like, premature or not, even assuming it is, there are going
16 to have to be some decisions made by lawyers, by judges, by
17 maybe different courts, by panels. And one thing, probably
18 at a minimum, is with or without objection, they will --
19 when we get together again, unless there is some highly
20 compelling reason that we shouldn't do so a few weeks out,
21 as I said when we first came in the courtroom, obviously
22 that is one of the things that we are going to need an
23 update on. And with or without an agreement, probably some
24 coordination to get some decisions made so that people know
25 where they stand.

1 MR. CUNNINGHAM: Your Honor, if I could speak to
2 that?

3 THE HONORABLE JUDGE DONOVAN FRANK: All right.

4 MR. CUNNINGHAM: Tom Cunningham. I represent --

5 THE HONORABLE JUDGE DONOVAN FRANK: You can
6 speak -- as long as you can speak into the mike, we are
7 fine.

8 MR. CUNNINGHAM: I represent General Motors in one
9 of the car cases. Actually, I represent Ford, as well, but
10 Ford is settling out.

11 We think the cases are very similar. It is the
12 same patent. I would be surprised if different claims -- if
13 the claims are different. I fully expect the claims that
14 are asserted against my trucking companies, to be asserted
15 against General Motors, as well. So, your question about
16 are there going to be similar terms that are going to need
17 to be construed, I imagine that there are. But, that said,
18 GM does feel that it would be beneficial for GM and the
19 other car companies to be part of this, so there will be
20 consistent rulings on claim construction. There will be a
21 consolidation of efforts toward validity and Markman that
22 would save money for all of us, and for the plaintiff, as
23 well.

24 So, we are going to be going to the MDL and filing
25 a notice of a tagalong case. And we are also reaching out

1 to the other car companies to try and get their positions.
2 They are just filing appearances now, so we are just
3 figuring out who their counsel are so we can get ahold of
4 them. And I would be surprised if they had different views,
5 but we will see and then we can update the Court.

6 THE HONORABLE JUDGE DONOVAN FRANK: All right.
7 Shall we move on? Absent an objection, we can -- then,
8 before we leave here this afternoon, we will put together a
9 date; but, this obviously, as long as everybody is getting
10 notified, any updates between now and whenever we get
11 together again, because what I anticipate is regardless of
12 the consensus, regardless of the number of objections,
13 separate from this issue that has been raised, this may come
14 into play, or it may not, initially. If not before, after
15 the next time we get together, whatever format that takes,
16 there will be a, with your input, be an initial case
17 management order that will come out that hopefully will
18 dictate, you know, subject to further orders of the Court,
19 moving the case along with some meaningful deadlines and
20 subject address. So, absent a revisitation of that issue,
21 and I appreciate that. Now I understand it. I wasn't
22 entirely sure what it meant when it said inclusion of the
23 car manufacturer cases, and I do now.

24 MS. MERRIETT: Honestly, the willfulness issue
25 would require much more discovery than what is required from

1 all of the other defendants in the MDL.

2 THE HONORABLE JUDGE DONOVAN FRANK: Then, of
3 course, we get into the interesting issues, including the
4 "B" word, bifurcation, and other such issues, but it had
5 come up oftentimes, sometimes uniquely to patent cases.

6 But, at least, I think -- I am not going to hold
7 anybody to anything, but we can -- I think some of you
8 probably with or without this issue, want to know, well,
9 when are we going to hit the road, so to speak, and get some
10 order in place?

11 Well, I think we will have this next date in mind
12 before we leave. And whether somebody persuades us that,
13 well, on that date or before it is entirely premature, not
14 for an order, but to go into these areas, we will just deal
15 with that if and when it comes up.

16 Did you hear back there the thank you's?

17 THE CLERK: I did.

18 THE HONORABLE JUDGE DONOVAN FRANK: Some of them
19 didn't know there were speakers on back there.

20 THE CLERK: Thank you.

21 MR. WILLIAMS: Your Honor, one point left on the,
22 number one, before we move on. Procedurally, it does not
23 materially delay these proceedings if there are tagalong
24 cases that come later on.

25 THE HONORABLE JUDGE DONOVAN FRANK: Right.

1 MR. WILLIAMS: It does move much more quickly, and
2 I can say that from the experience we had in the Ohio case
3 that they do move along more quickly.

4 Then I would just cite Rule 1 of the Federal Rules
5 of Civil Procedure and leave it at that.

6 THE HONORABLE JUDGE DONOVAN FRANK: All right.

7 MR. WILLIAMS: Item two, Your Honor, Mr. Florey
8 would speak on behalf of the defendants with respect to that
9 one.

10 THE HONORABLE JUDGE DONOVAN FRANK: All right.

11 MR. FLOREY: Good afternoon, Your Honor.

12 THE HONORABLE JUDGE DONOVAN FRANK: Good
13 afternoon.

14 MR. FLOREY: Michael Florey from the Minneapolis
15 office of Fish & Richardson. Many years ago I worked in
16 this courtroom as a law clerk to Judge Renner, and I will
17 confess, we did listen to the discussion in the courtroom
18 back in chambers.

19 THE HONORABLE JUDGE DONOVAN FRANK: Well, I don't
20 want to get counsel off track, but I came here -- I had been
21 a State Judge for some time. But, I came here in 1998, and
22 I think it is appropriate to say when I came here in '98,
23 chambered next to me was Judge Robert Renner. And I am sure
24 other people have similar things to say, and I will be
25 brief.

1 But, he called me into his chambers the first day
2 I was here in October of 1998 and here is what he said to
3 me. And maybe he would have said it to somebody who hadn't
4 been a State Judge for 14 years, maybe he would have said it
5 to a lawyer who hadn't been a judge in any capacity.

6 But, here is what he asked me. Do you understand,
7 Donovan, the meaning of a lifetime appointment? I said,
8 well, whether I do or I don't, I think you are about to tell
9 me. And Judge Renner said -- you reach down inside, and
10 this is Judge -- the Late Judge Robert Renner. And those of
11 you who knew him, this won't be a surprise. You reach down
12 inside yourself and you try to do the right thing under the
13 law and the promise you keep with the oath that you have
14 taken, regardless of what the public or anyone else thinks.

15 And if you don't understand that, that lifetime
16 appointment is going to go to an entire waste. That was the
17 first piece of advice I got. And it was from Judge Robert
18 Renner, because his chambers, as you know, was right back --
19 Judge Alsop still comes in and uses that visiting chambers
20 now. So, I haven't forgotten those words from His Honor
21 Robert Renner. So --

22 MR. FLOREY: He was a fine man.

23 THE HONORABLE JUDGE DONOVAN FRANK: He was indeed.
24 He was a quick wit, and a great sense of humor, too.

25 MR. FLOREY: Indeed. And my wife was clerking for

1 Judge Alsop when the two of us got married. Those are good
2 memories.

3 In any event, Your Honor, we have already heard
4 some discussion of the *Mansell* case that Judge Lynn handled.
5 And I think everyone agrees that there is relevant
6 information there. It is the same patent. The two
7 inventors testified. There is relevant deposition
8 testimony. The case was tried. There's relevant exhibits.

9 The reason we put this on the agenda is, as is
10 common in high-tech and patent cases, there is a protective
11 order in place. And much of the docket in Texas is filed
12 under seal. And we cannot access it, even though I think
13 everyone agrees the information is relevant. So, this is
14 really almost a part of number 6, the stipulated protective
15 order. We wanted to call this to your attention.

16 Judge Lynn is a Transferor Judge. She has one of
17 these cases. And we think this would be a situation as you
18 mentioned to coordinate with another judge.

19 THE HONORABLE JUDGE DONOVAN FRANK: I will pick up
20 the phone and make --

21 MR. FLOREY: So that you might reach out to her
22 and harmonize the protective orders so that her protective
23 order from *Mansell* will not impede discovery in this case.

24 THE HONORABLE JUDGE DONOVAN FRANK: I will do
25 that. And I would also, if you haven't -- and I am speaking

1 to the whole group, the protective order that is in our
2 Local rules, that the local patent lawyers who are on the
3 Federal Practice Committee get the primary credit for, that
4 is in our Local Rules, uniquely to patent cases, because of
5 the number we have. I think that will be, apart from this
6 issue, it will be of some help as we move along to expedite
7 things. But, I will reach out to her no later than, if it
8 is not tomorrow, Monday next week. We will get it
9 coordinated. Because it is fine with me, just so you know,
10 I suspect what is going to happen here is she will put the
11 ball into my court and say: Well, I will -- you will make
12 some decisions, and maybe we will do them jointly, but we
13 will make sure that we do that so -- and I would be -- we
14 will get it worked out so all of the parties here have
15 appropriate access.

16 MR. FLOREY: And jumping ahead just a bit, Your
17 Honor, since you mentioned the local protective order, we
18 did discuss that among the joint defense group. And we are
19 amenable to adopting that order. I believe that there are a
20 couple of defendants that have some particular issues around
21 source code. They may need an addendum for special
22 protection for their confidential source code. But, in
23 general, we are amenable to using the District's Order.

24 I would also add, very briefly, since I represent
25 over 20 of the remaining defendants, we also agree that the

1 car cases should be part of the MDL. From our point of view
2 it would make no sense to have three courts litigating the
3 same patent at the same time.

4 So, I know Mr. Williams couldn't speak on behalf
5 of everybody, but just to make clear that for Xata and FedEx
6 and the many other trucking companies I represent, we would
7 have no objection to that. Thank you.

8 THE HONORABLE JUDGE DONOVAN FRANK: All right.

9 MS. MERRIETT: Your Honor?

10 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

11 MS. MERRIETT: I will go ahead and come to the
12 podium. In order to move our -- can you hear me?

13 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

14 MS. MERRIETT: On the agenda items, so that we
15 don't have excessive argument, although most of these things
16 are items that I believe that we can meet and confer over,
17 and we had met and conferred on the stipulated protective
18 order. I have collected all of the documents that are not
19 under seal in the *Mansell* case. And they are already in my
20 files. We are processing them now.

21 We have, you know, for our Rule 26 conference,
22 we're meeting and conferring on some of those dates. Of
23 course we would seek, depending on when and if the car cases
24 would come in, that would move some of these along. But, we
25 also have -- you know, we are amenable to ADR, and I'm not

1 sure about the lead counsel issue; but, other than, you
2 know, maybe uniform positions on validity and claim
3 construction which you have kind of touched on already,
4 there is not a lot that we dispute on the agenda, really.

5 We can meet and confer on the Rule 26. And the
6 only thing I have is I would like to get -- of course I
7 would want 6 to 9 months to get to trial, but if we are
8 going to have the trucking companies in, you know, that may
9 push things back to the end of the year. But, that will
10 kind of set our Rule 26, which we would have prepared by,
11 you know, in no time.

12 We have already kind of met and conferred a little
13 bit on that with some of the defense counsel. But, I just
14 want to make sure that most of the timing and sequence,
15 other than the uniform positions, and uniform
16 interrogatories, setting maybe a limit, so we aren't
17 overburdened and --

18 THE HONORABLE JUDGE DONOVAN FRANK: Well, let me
19 ask this. If we -- one of the dates we are going to
20 suggest, and that is actually why Ms. Schaffer came in and
21 handed me the sheet, because she was conferring with Judge
22 Rau's chambers.

23 If one of the dates we submit, and if either some
24 of you say, no this won't work, or we need to check back
25 with our offices, we will get this straightened out in the

1 next few days so we know when we are back together again.

2 We are thinking of a date like February 1st, for
3 example, where there would be in between there some
4 additional meet and confer. And then we would get a
5 proposed initial case management order, so it would be
6 crystal clear what people agree on and what they don't,
7 whether the point of departures are plaintiff/defendants, or
8 plaintiff/defendant, plus individual defendants, because we
9 have to try to have due regard for the smaller versus larger
10 defendants. Sometimes that is a criticism of MDLs,
11 everybody gets swept in together.

12 But, also, we will stay focused on this economies
13 of scale without cutting any corners. Is that timeline
14 before we cast the die with at least an initial case
15 management order, is that realistic in your view?

16 MS. MERRITT: Yes, I believe it is. I mean, I am
17 spending Christmas with my children; but, other than that --

18 THE HONORABLE JUDGE DONOVAN FRANK: February 1st,
19 because I'm not --

20 MS. MERRIETT: Other than that, February 1st -- I
21 have already drafted it. And I am ready to meet and confer
22 and I have got my discovery ready. It has been a long time
23 coming for us to get up here to Minnesota. And I am looking
24 forward to the four to six-week hearings. And I will try to
25 attend those in person as much as I can, and make sure I

1 realize the geography of getting up here from Texas, you
2 know, and my two-year-old at home that I should get more
3 daycare for. So, I am going to make the logistical issues
4 work out better in the future so I have more time to meet
5 and confer with the defendants at my office. And we may be
6 able to settle over half of these cases. And that will give
7 time to move for default on the 14 -- either move for
8 default or find the counsel for the 14 unrepresented
9 defendants, all right? So, I will be able to do that. I am
10 efficient. And I think I already have relationships with
11 Mr. Florey and other people in the room. Most people have
12 talked to me on the phone at least once. If they can, you
13 know, get ahold of -- if we can get in touch and play phone
14 tag. So, I am very confident that we can, other than maybe
15 the issues for uniform briefing, you know, I even don't
16 necessarily disagree if there are issues on uniform briefing
17 where there are small claim issues, perhaps a supplemental
18 briefing of five pages or something, so it is not
19 overwhelming. But, if there are issues among defense
20 counsel, that they can work it out, make this efficient, and
21 move this forward, and move this along.

22 And I know I am excited about moving it along.
23 February 1st would be great to do that, and I will be ready.
24 So, like I said, other than, you know, the timing and
25 sequence of claim construction, and I know we have looked at

1 some of the previous -- your previous patent orders and MDL
2 orders, so -- I mean, I am ready to meet and confer and be
3 as amenable as possible so that we can get things going.

4 THE HONORABLE JUDGE DONOVAN FRANK: And I will
5 come back to the ADR before we are done, here.

6 MS. MERRITT: Yeah, let's do.

7 THE HONORABLE JUDGE DONOVAN FRANK: All right.

8 MS. MERRITT: I mean, all of these things,
9 including the GM issue, I mean, are things that we
10 definitely are willing to work out.

11 THE HONORABLE JUDGE DONOVAN FRANK: All right.

12 Mr. Williams?

13 MR. WILLIAMS: Your Honor, I think that we, as a
14 group, agree that it makes a great deal of sense to have a
15 meeting in about six weeks. In fact, we talked about that
16 very procedure earlier today when a group of us gathered.
17 But, what we thought first, what we needed before we could
18 even begin to discuss what that case management schedule
19 would look like, we have still not been told which claims of
20 this patent any of us infringe or what the charges are
21 against us.

22 So, we are kind of like standing in the dock
23 waiting to find out the indictment before we can begin to
24 decide what our case is going to be. So, if we could get,
25 you know, at least three, or no more than, or no less than

1 two weeks in advance of that February 1st hearing, if we
2 could get the plaintiff to identify which claims are going
3 to be at issue so that we can then give you our two cents as
4 to how this case ought to be managed, how big it is going to
5 be, how much discovery needs to be done, and what is all
6 there, we can't really get to that until we do.

7 THE HONORABLE JUDGE DONOVAN FRANK: Sorry to
8 interrupt, but have you taken a look-see at how our case
9 management order in this District, and there's more than one
10 way to handle these cases, but how we do the claim chart,
11 the give and take between the parties?

12 Because that is really where that begins. But you
13 are saying that well, we could probably expedite this if we
14 had an idea of if there is -- I will use the phrase, it is
15 not a legal phrase, one or two or three big ticket items
16 saying: Well, here is the key issue in the case, or the
17 clear claim, or the term that is the big ticket item in the
18 case. That is what you are suggesting?

19 MR. WILLIAMS: Yes, Your Honor. I have looked at
20 Your Honor's Guidant -- I have not looked beyond that, and I
21 also looked at the ones that I have personally been involved
22 with. So --

23 THE HONORABLE JUDGE DONOVAN FRANK: It is true, it
24 is not gratuitous that in a number of districts with higher
25 patent case loads, that we come up with a -- really, again

1 to the credit primarily of the lawyers, even though a couple
2 of us are on the claim construction, and the Markman hearing
3 group. It is really the lawyers that put together that
4 order that you see.

5 Do you want to get in here, Your Honor?

6 THE HONORABLE MAGISTRATE JUDGE RAU: Not now. I
7 will tell you.

8 THE HONORABLE JUDGE DONOVAN FRANK: And so, you
9 can see how it is customized to the patent cases, because
10 the regular scheduling orders we learned the hard way over
11 the years, they don't work. In other words, the claim chart
12 requirements are a classic example of that, the give and
13 take between the parties to focus in on, well, what is the
14 nature of the infringement? So --

15 MR. WILLIAMS: And Your Honor, to speak
16 specifically to the issue of the difficulty of even
17 beginning to work on the case management schedule, Mr. Lee
18 and Mr. Hill would both like to briefly comment on the
19 specific issues that they have on behalf of their clients.

20 THE HONORABLE JUDGE DONOVAN FRANK: All right.

21 MR. WILLIAMS: Mr. Lee represents U.P.S.. And I
22 think that kind of highlights the real problems that you
23 have without knowing what the claims are at this point of
24 being able to have a case management conference. So, Mr.
25 Lee?

1 MR. LEE: Just real quick, Your Honor, Bob Lee
2 with Alston & Bird. I represent United Parcel Service,
3 U.P.S. Ground Freight, which is a separate legal entity, and
4 The Coca-Cola Company. And to touch on this point and make
5 reference to, I guess, another agenda item, is we did file a
6 Motions to Dismiss, Your Honor, based on the pleadings that
7 were asserted against our clients. Those motions are set
8 for hearing at the end of January.

9 The plaintiffs' opposition paper is due the
10 beginning of January. It may be that motion can be resolved
11 through a procedure like this that you are alluding to or
12 counsel is alluding to by her preparing her case and getting
13 ready to go forward. But, if you look at our position,
14 U.P.S. doesn't fit in the same type of category as localized
15 shipping companies. I mean, U.P.S., itself, has vast
16 operations, vast fleets. U.P.S. operates the country's
17 eighth largest airline. So, there are lots of fleet
18 management systems in their airline operations.

19 We are looking at these allegations at this point
20 being fleet management systems. But, U.P.S. has lots of
21 fleets and lots of systems, so we are not even sure what we
22 are dealing with, what is accused. And given the number of
23 claims in the patent, there are 15 claims. We don't know
24 what the permutations could be. When you start multiplying
25 system-wide claims, how big this is for U.P.S.. That was

1 the premise of our motion.

2 Coca-Cola has a little bit different of a
3 situation in that everybody knows who they are and what they
4 do, and they operate themselves fleets, but they are not a
5 technology or logistics company like U.P.S. who may develop
6 a lot of their own technology.

7 Coca-Cola may be someone who purchased their
8 technology from some third party, but we again are not sure
9 what is accused, so we don't know if there's joinder issues
10 to bring in other third parties, providers. And so that
11 highlights for us a desire to engage in some early
12 disclosure of claims or accused systems, like what Mr.
13 Williams was suggesting. And once we have an idea of what
14 we are dealing, we will be in a much better position to come
15 to the Court and say, here is consolidated discovery, here's
16 limits on discovery, here is a schedule for claim
17 construction when we again have an idea at that time of what
18 we are dealing with. And we are sitting at this point still
19 having lots of questions.

20 And maybe we can take these motions off the
21 calendar if there is a procedure in place to facilitate some
22 of that over the next month or two. I am finished. I guess
23 I could answer any questions if you all were --

24 THE HONORABLE JUDGE DONOVAN FRANK: Not just yet.
25 We may have. Thank you.

1 Go ahead, Counsel?

2 MR. HILL: Good afternoon, Your Honor. Steve
3 Hill, again. In looking at this, I looked at your form for
4 your Local Patent Rules in anticipation of today's hearing.

5 THE HONORABLE JUDGE DONOVAN FRANK: Right.

6 MR. HILL: Of course the disclosures that are
7 required in those are what we would typically call claim
8 chart form disclosures of infringement. I don't think at
9 this point what Navtrak or other defendants are interested
10 in locking down is that level of detail, although we
11 certainly want to see that in time.

12 I think at this point what my client is
13 particularly interested in, and I know Mr. Lee's client is
14 from what he said, given the acquisition history, companies
15 are acquired, Legacy technologies are resident. But, you
16 are also acquiring other companies, they have technologies.

17 At this point in time, we are just trying to fix a
18 target and understand what is the commercial system that is
19 being attacked? Or what are the commercial systems in some
20 cases that are being attacked? Just name them or describe
21 them functionally, and tell us which of the more than a
22 dozen claims of this patent are actually being asserted
23 against us.

24 Now, why does a small, relatively small defendant
25 in this group care about that? Well, one of the things that

1 we are trying to do as a smaller fish in this pool is we are
2 trying to handle this case as efficiently as we can, cost
3 effectiveness, and an understanding of the merits of the
4 case against us have to be balanced hand in hand.

5 We want, therefore, to be able to develop uniform
6 positions as much as possible on claim construction and
7 invalidity with the rest of the team. But, at this point in
8 time, it is difficult to have a phone call with one of these
9 other astute counselors and say, what do you think the
10 construction ought to be on claim 12 on this particular
11 element?

12 Response: Well, I am not sure claim 12 is being
13 asserted against my client, so I don't really know. And I
14 haven't given it any thought.

15 The compression of the standard Local Patent Rules
16 is going to put an awful lot of pressure on the defense
17 group once detailed claim charts are presented. We are
18 going to be expected in lock step fashion to come forward
19 with invalidity contentions on specific claims that we are
20 each being accused of infringing.

21 We are going to be expected in that process to
22 develop as much as possible some uniformity to our claim
23 construction. And it is in everybody's interest to have
24 uniformity where uniformity makes sense. But, one of the
25 things, tactically, that a client like mine has to take into

1 consideration is, how much uniformity do we really have on
2 claim construction, and how much of this are we going to be
3 on our own for. And are there places where, tactically, it
4 is not going to make sense for us to stay in this case
5 because the claim construction we would want on a particular
6 claim term seems to be at odds with what the rest of the
7 group does.

8 Under our Local Rules, as I read them, we have
9 about 30 days from the receipt of their claim charts to do
10 everything that I just described. And so what I am trying
11 to do is get out ahead, and asking the Court to let the
12 plaintiff within the next 30 days give each defendant simply
13 a description of the technology that they need to be
14 concerned about and which particular claims they need to be
15 focused on. And then we can confer before we come back in
16 the first week of February, we will have two weeks to confer
17 amongst ourselves on whether or not that form case
18 management approach for patent cases in this District makes
19 sense, whether or not given the number of claims at issue,
20 and who is facing what claims. It may make more sense to
21 give more time on certain of the deadlines than the normal
22 schedule would provide. And also, how much time,
23 realistically, it is going to take the defense group to
24 develop as much uniformity as possible on claim construction
25 so we can get a realistic view of when we can do Markman.

1 THE HONORABLE JUDGE DONOVAN FRANK: Or, let's just
2 step back for a moment and look at MDL cases, whether it is
3 a patent case or not. At some point early on we talk about
4 a creature called the master consolidated complaint where a
5 plaintiff must say, as to you, here is what we say. As to
6 you, here is what we say. And sometimes -- in other words,
7 that actually is an issue that comes up early on in an MDL
8 case, because obviously it isn't sufficient to say, well,
9 there are X number of defendants, and we don't have to
10 specify -- and we will see what plaintiff says.

11 Going through the process, and I would suggest it
12 would be the same even before the *Iqbal*, *Twombly* days, where
13 we come in and I will be hearing a similar motion tomorrow
14 saying, well, they just grouped us all together, and that is
15 not sufficient depending upon what device we are using and
16 how we are using it in a patent context.

17 Then, of course, we get into -- well, is it really
18 beneficial to continue it or dismiss it without prejudice
19 and come back in? You are saying, let's see if we can focus
20 in on the issues that might save everybody some time here,
21 and money, and minimize delay.

22 MR. HILL: Yes, Your Honor. And while the master
23 consolidated complaint makes some sense, and I was reading a
24 decision out of the Eastern District of Virginia yesterday
25 where a judge, sua sponte, granted dismissal of a complaint

1 for patent infringement because it didn't identify which
2 claims were being asserted, and it didn't describe to the
3 judge's satisfaction what was being accused of infringing.

4 If Your Honor is going to approach it sua sponte
5 and read the consolidated complaint through that kind of a
6 looking glass, then by all means. But, I am not suggesting
7 that I want to slow the process down with a lot of potential
8 motions to dismiss at this point. I think what we are just
9 genuinely interested in is having this case move out of the
10 shadows so that we understand what a fixed target is that we
11 have to deal with, so we can begin arranging, tactically,
12 because of the unique considerations of having to work with
13 such a large group of defendants.

14 MS. MERRIETT: Your Honor, if I can, I would like
15 to --

16 THE HONORABLE JUDGE DONOVAN FRANK: Why don't I
17 just get one word from you, Counsel, and then we will hear
18 from plaintiff?

19 MR. FLOREY: Yes, I will be very brief, Your
20 Honor.

21 THE HONORABLE JUDGE DONOVAN FRANK: All right.

22 MR. FLOREY: I want to just put a little meat on
23 the bones of why this issue of claim identification is so
24 critical. This patent, the '844 Patent, has been through a
25 reexamination proceeding at the Patent Office. And as a

1 result of the reexam, some of the claims came out unchanged,
2 whereas other claims came out amended. And it is very
3 important, I think, for each defendant to learn whether the
4 plaintiff is asserting only the unchanged claims, or will
5 also be asserting some of the amended claims.

6 Because if the plaintiff is asserting the amended
7 claims, then we have to dive into the reexam pool, whereas
8 if they are only asserting the unamended claims, we don't.
9 And that is really important information and another reason
10 that we are looking for this early disclosure of asserted
11 claims. Thanks.

12 MS. MERRIETT: Well, with all due respect, Your
13 Honor, this patent is a very simple patent, as I explained
14 to the JPML Panel. It is very simple. Most everyone here,
15 everyone who has met with me or talked with me about early
16 resolution is aware of, generally, how we are interpreting
17 the patents. I haven't hidden the ball at all. I have
18 talked to almost every defense counsel. The one I have not
19 met with and said: Hey, let's look at this. You know, this
20 is how we are asserting the patent. It has been through a
21 reexamination. It is this trucking -- it is a simple
22 patent. It is a FleetMatics Patent. And the claims are not
23 difficult to understand. This is not a technically complex
24 case. This is not a semiconductor case. This is a very
25 simple patent, as far as patent cases go.

1 But, based on what I am hearing today, I am
2 wondering, you know, the defendants asked for an MDL and
3 asked for an MDL in this forum. So, I am wondering about
4 the -- if there is no uniformity in positions, I don't know
5 why we are here. And you can't have it both ways. You
6 know, you asked to be here. We argued over the location.
7 And we are here. And we are ready to go. And I spent a lot
8 of time, and I have worked on this. But, like I said
9 before, we are amenable to this.

10 But, if there is not going to be any agreement or
11 meet and confer before -- on the motions, and there is so
12 much difference between the small fish and the big fry, and
13 now the car cases, you know. There's not so many defendants
14 now, there's, you know, 60 defendants, that we
15 necessarily -- you know, if we can't agree on it and
16 everything is going to continue on, I am just a little
17 concerned.

18 I thought things in this courtroom were efficient
19 and ran on parallel tracks in a lot of cases. You know,
20 this is an efficient Court. And I don't think I have much
21 else on this, but I do need to ask for, request a break if
22 we can take one?

23 THE HONORABLE JUDGE DONOVAN FRANK: Well, let me
24 -- I didn't actually -- I heard it a little bit differently,
25 but maybe it doesn't matter how we heard it. I didn't hear

1 some of the -- all of these differences, that kind of
2 differences. But, regardless of what has been exchanged
3 between you, verbally, in writing, whatever, is it realistic
4 to say, call it whatever you like. We can even stay away
5 from terms like claim chart, preliminary claim chart, master
6 consolidated -- but we can stay away from all of those terms
7 to say, especially if it is your view that, well, the truth
8 of the matter is it is essentially the same, the same terms,
9 same claims are going to be in dispute because it is such a
10 simple patent, and there are common issues involved.

11 Whether you believe you've already relayed that to some or
12 all of the parties or not, is it realistic to do so by
13 mid-January, whether you call it a meet and confer, and
14 whether it is a combination of a meet and confer and
15 something in writing the Court doesn't even have to be privy
16 to until we get together in February, so we don't come in
17 here on February 1st? And with our or without
18 justification, one or more parties are saying, we are
19 clueless as to how we infringe this patent. Is that -- is
20 that --

21 MS. MERRIETT: Your Honor, I am not necessarily
22 opposed to -- you know, if February 1st is not the right
23 date, and the master consolidated complaint might be
24 something that we -- you know, we would not --

25 THE HONORABLE JUDGE DONOVAN FRANK: I am not even

1 saying we have to go there.

2 MS. MERRIETT: Yeah, we may not have to go there,
3 but I could meet with my client, and we have done our
4 analyses. And like I said, I am not saying that any of
5 these -- we are not amenable to any of these vehicles, but
6 if February 1st is too soon and Your Honor agrees, then --

7 THE HONORABLE JUDGE DONOVAN FRANK: I don't
8 actually -- I don't think it is too soon.

9 THE HONORABLE MAGISTRATE JUDGE RAU: We are not
10 going to wait.

11 THE HONORABLE JUDGE DONOVAN FRANK: No, I don't
12 think it is too soon.

13 MS. MERRIETT: Like I said, I am confident that we
14 can get these issues resolved, and on the Rule 12 motions,
15 you know, that we have.

16 THE HONORABLE JUDGE DONOVAN FRANK: But, what I --
17 I am not going to try to force somebody to avoid a Rule 12
18 motion, but it would seem to be, unless you are going to
19 say, well, especially not even remarks about, well, it is a
20 really simple patent, comparatively speaking, to say whether
21 you believe you have given them fair notice verbally, in
22 writing, or in some other forum, apart from whether any
23 dismissal motions have been filed, to say: Well, we can get
24 together, we can give them a summary of -- yeah, right here
25 is how you infringed this patent. And there are little or

1 few differences, we claim, across the board on every
2 defendant with this variable. I think that is what I am
3 hearing over here, saying, we would like either notice or a
4 little bit more notice, because I am not convinced there
5 aren't probably a lot of similarities. I guess we will know
6 soon enough.

7 But, is that realistic? And if your view is I
8 have already provided that to them, well then you don't have
9 to explain to me how you have done that; but, with or
10 without the meet and confer, say, well here, I am going to
11 repeat again for you how your client is infringing this
12 patent.

13 MS. MERRIETT: How the defendants and their
14 particular systems --

15 THE HONORABLE JUDGE DONOVAN FRANK: Right.

16 MS. MERRIETT: Some of them have said today that
17 they have got multiple Legacy systems and multiple different
18 devices.

19 THE HONORABLE JUDGE DONOVAN FRANK: Well, let's
20 just ignore --

21 MS. MERRIETT: So, I am supposed to identify
22 there -- I mean, identifying the claims that we intend to
23 assert, you know, with the reservation that --

24 THE HONORABLE JUDGE DONOVAN FRANK: Let's do that.

25 MS. MERRIETT: That, you know, the claims we

1 intend to assert with the reservation that if in discovery
2 we find that there are new systems or different systems that
3 we were unaware of or, you know, I mean, I am not going to
4 identify -- I wouldn't want to prejudice my client's
5 position.

6 THE HONORABLE JUDGE DONOVAN FRANK: Oh, no. No,
7 no, no.

8 MS. MERRIETT: I mean, identifying the claims,
9 and, you know, I don't have problems identifying the accused
10 systems. I mean, they know what claims -- you know, at this
11 stage of the game, setting that up -- I thought that was
12 part of the litigation. So, I thought here I can identify
13 claims. I think that is not going to be a problem. I mean,
14 you know, we are pretty -- plaintiffs said it is not a
15 complex patent in identifying which claims we think we
16 should assert, or we plan to assert, I mean, I don't know
17 that that is going to be a problem.

18 THE HONORABLE JUDGE DONOVAN FRANK: I don't see
19 any -- and what you have just described, your concern, that
20 is a reality in a number of patent cases. But, no, I
21 actually was thinking even if we -- because it doesn't seem
22 like it would be a futile gesture to say, well, I really
23 think they are on notice with what they have got thus far,
24 but whether they are or they are not, we may reserve and
25 expand our allegations, depending upon, for the reasons you

1 have just stated. However, as we sit here today, without
2 prejudice to assert things as they change, here is our --
3 here is how plaintiff claims today that you are infringing.
4 It seems to me that is what they are asking for. And we
5 will find out soon enough if that is an oversimplification,
6 so that when we come together on February 1st --

7 THE HONORABLE MAGISTRATE JUDGE RAU: We will know.

8 THE HONORABLE JUDGE DONOVAN FRANK: We will know
9 or have a general idea that, well, here is what the claim is
10 by the plaintiff, and here is our position today.

11 Obviously, there is nothing the Court can do to
12 prevent you, or frankly speaking, the individual defendants
13 from changing that view if discovery would send you in that
14 direction down the road. But, just to get this preliminary
15 look to see, well, can we save some time, or focus this on
16 what might be issues that are equally important to one or
17 all defendants as they are to your client to say: Well, if
18 that really is a primary claim, let's go there. That is
19 what I think may be -- and then we can discuss the master
20 consolidated complaint and all of the rest of it, formal
21 claim charts at the February 1st and the timing of that.
22 But to have some exchange, much like a free-standing case,
23 at least in this District, patent or not patent, where
24 Magistrate Judges, as Judge Rau can say is, well, come to
25 that initial conference and tell us why we shouldn't have,

1 with or without limited discovery or exchanges, some early
2 settlement issues on one or more issues. And why is it
3 realistic or why is it not? Some of those things happen
4 early on. I will talk more about that apart from what is
5 raised here.

6 But, could you accomplish that with or without a
7 meet and confer to say: Well, we think it is pretty simple
8 what we are claiming. But yeah, to the extent there are any
9 differences in our claims, we claim this defendant does
10 this, this defendant does that. And it sounds like there is
11 not a lot of variation unless they provide discovery that
12 would suggest otherwise. Is that realistic?

13 MS. MERRIETT: By February 1st?

14 THE HONORABLE JUDGE DONOVAN FRANK: I was actually
15 thinking of, say, mid to the second or third week in January
16 to say, here is generally the lay of the land on what we
17 claim. And no, we don't claim exactly the same thing
18 against each defendant. There are some variations. I am
19 not asking for a claim chart. That is not realistic between
20 now and then.

21 MS. MERRIETT: Possibly. I have to -- I will be
22 out of -- I won't be back in town until the 4th of January,
23 and I leave the 22nd with my family on a trip, a pre-planned
24 trip. So, that is my only vacation and --

25 THE HONORABLE JUDGE DONOVAN FRANK: Well, I am not

1 going to interfere with that.

2 MS. MERRIETT: Yeah, I have met with everybody,
3 almost every defense counsel in this room except, you know,
4 maybe the one who spoke. So, most of them, most people are
5 aware, and that is why I have been able to resolve most of
6 these cases.

7 But I am happy to try to identify -- I will meet
8 with my client and I think that is something that we can
9 consent to.

10 THE HONORABLE JUDGE DONOVAN FRANK: Here is what I
11 am going to -- and I think I can request this without
12 interfering with vacation plans.

13 And I say it in all seriousness. We are not -- I
14 say it in all seriousness, even if I hadn't raised five
15 daughters, two sets of twins. Now my youngest twins are 22.
16 So, I am not going to trample on that, and we don't need to.
17 I don't think anybody is going to convince me of some
18 prejudice.

19 But, what I think is reasonable for us to do here
20 is to say: All right, you are going to work on this on the
21 4th. What I would suggest is -- because I think -- exchange
22 what each of you need, what you think is reasonable from one
23 another, and then if you get to mid-January and you are
24 saying: Well, I am doing my best to supply what they asked
25 for, and they believe, perhaps, that you are. And we are

1 going to have to get ahold of the Court and say, this
2 February 1st date we thought would work, but it may not. Or
3 can we bump it out a couple of weeks? I think what we will
4 do is we won't know until we step off of the curb and head
5 in that direction.

6 And it will be hard to persuade us -- I mean, you
7 have to rely on a schedule so we don't disrupt somebody
8 else's. So, I would suggest that is what we ought to do
9 here so we can get some order in place. And whether the
10 magic date is February 1st or later than that -- do you want
11 to be -- you have been involved in a couple of these issues,
12 Judge Rau.

13 THE HONORABLE MAGISTRATE JUDGE RAU: I would just
14 suggest that if you are certain you think this case should
15 be resolved by the end of the year, that having these issues
16 identified for these defendants by February 1st is easy for
17 you to do if you think that you can get it resolved and
18 tried on its merits and concluded by the end of the year.

19 MS. MERRIETT: Well, it should be. I mean, I have
20 met with most of them and talked to them about their devices
21 and talked to them, but I don't know all of the devices that
22 they have. But, the ones I have met with and gone through
23 the devices, and gone through the elements, I have done
24 that. You are right.

25 So, I would like to get it done by the end of the

1 year, and you are right, against the -- there may be one
2 wrinkle is that the trucking companies don't use -- there is
3 not necessarily overlap between the trucking companies.
4 Like let's say a trucking company will use some of the Xata
5 or Xata products. I'm not sure how to pronounce that. And
6 then they will also use some Qualcomm products. So, there
7 is not complete overlap. So, identifying -- I will identify
8 the claims I think generally will be asserted against most
9 of the defendants, because it is pretty uniform. You know,
10 I mean, it is interpreted one way. We are interpreting the
11 patent this way, and the devices either infringe or they
12 don't, right? So I think I can do that. And I will do my
13 best to do that. But --

14 THE HONORABLE JUDGE DONOVAN FRANK: Because the
15 only -- I mean, the worst case scenario, which isn't
16 really -- isn't that bad of a scenario. It is really, well,
17 what will the Court do with it and the parties? If you do
18 your best to do that and we roll in here on February 1st,
19 and one or more of these people are saying, we know no more
20 today than we knew back when we saw you on that day in
21 December, on the 15th of December in St. Paul, I guess
22 that's -- we will know if and when that happens. And we
23 will just deal with it. But --

24 MS. MERRIETT: Okay.

25 THE HONORABLE JUDGE DONOVAN FRANK: Because I

1 think that that, early on, whether it was a patent case or
2 not, the earlier we can identify some of those issues
3 without oversimplifying the case or trying to pin people
4 down irrespective of discovery, that is what moves cases;
5 that is what will, without question. So, let's try to do it
6 in that fashion.

7 Counsel is trying to get our attention. So, go
8 ahead and step to the microphone.

9 MS. MERRIETT: I did need, Your Honor, to -- I
10 need to take a five-minute break.

11 THE HONORABLE JUDGE DONOVAN FRANK: We will take a
12 ten-minute break, here.

13 MS. MERRIETT: If you don't mind?

14 THE HONORABLE JUDGE DONOVAN FRANK: Go right
15 ahead. No, no, that is fine. My apologies both to you and
16 my court reporter for not taking a break. And then we will
17 see you in 10 minutes. Who is going to miss an airplane,
18 here, anybody?

19 MS. MERRIETT: I am. And that is why --

20 THE HONORABLE JUDGE DONOVAN FRANK: You are?

21 MS. MERRIETT: I am. I am a single mother of two,
22 and so I should have made better logistics.

23 THE HONORABLE JUDGE DONOVAN FRANK: What time is
24 your flight?

25 MS. MERRIETT: 4:45. I just thought the agenda

1 seemed so simple that I thought we were going to be here
2 about an hour or hour and a half.

3 MR. WILLIAMS: Your Honor, I think we could move
4 really quick through the rest of it, but if Connie
5 doesn't -- if Ms. Merriett needs --

6 THE HONORABLE JUDGE DONOVAN FRANK: We will go off
7 the record here.

8 (Discussion off the record.)

9 THE HONORABLE JUDGE DONOVAN FRANK: Why don't we
10 go back on the record, then? Whoever was hoping to get a
11 restroom break, here, go ahead and take it. We will keep
12 on, here.

13 MS. MERRIETT: I will have to get my car, then. I
14 have to go down and -- they said they were going to leave --

15 MR. WILLIAMS: Then I need to wait for her to
16 return, so --

17 THE HONORABLE JUDGE DONOVAN FRANK: I think we can
18 probably get you on the road, unless some defendants are
19 saying, well you have wasted our time, here. Let's finish
20 what we have started. But, if we can get you -- well, we
21 will have to get you out of here in the next 10 minutes and
22 then have you take a race down Shepard Road over to the
23 airport, but --

24 MS. MERRIETT: No, I was unsure if it would be
25 easy to get a cab from the courthouse or not, and how long.

1 You know, I am not familiar with the airport. But, I will
2 get there, and that is my logistical --

3 THE HONORABLE JUDGE DONOVAN FRANK: Well, let me
4 ask you --

5 MR. WILLIAMS: I can drive counsel to the airport.
6 We could talk over there. I would be willing to do that.
7 We just need, a couple of things that are critical before
8 we --

9 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Williams?

10 MR. WILLIAMS: If I might? Thank you.

11 THE HONORABLE JUDGE DONOVAN FRANK: All right.

12 MR. WILLIAMS: So, if we get nothing more, Your
13 Honor, today than -- we need more than just them to say, we
14 will talk about this product or that product, we need to
15 know these things. Of all of the claims in the patent, is
16 it every claim that they say they infringe? We will be
17 prepared to tell you how long that will take us.

18 If it is less than that, if it is only claims 7,
19 12 and 14? Great, we will tell you what we can do on that.
20 And if we have five products, let's say my company -- well,
21 three products, I will use an example. Qualcomm made
22 OmniTRACS, OmniTRACS Express and OmniTRACS Ultra. They
23 could say, only OmniTRACS Express is what is at issue in
24 this case and infringes these six claims, and here they are.
25 Even if we just get that, we can proceed. But, if we get

1 something less than that, we are back here on February 1st,
2 same conversation.

3 MS. MERRIETT: I hope that that's not going to
4 happen.

5 MR. WILLIAMS: And I think the rest of the items,
6 Your Honor, we can talk about in February, you know, after
7 we have had a chance to respond to that. Anything else that
8 is critical?

9 MR. LEE: I just would say that we are happy to
10 take our motions off calendar. We are the counsel with the
11 Motion to Dismiss. We are happy to take those off calendar
12 if counsel can provide this information so it is not an
13 unnecessary administrative effort just to respond to a
14 motion if we get the information we are asking for.

15 MS. MERRIETT: Your Honor, I am confident that we
16 have just a few -- the claims have been narrowed. We have
17 reviewed these items. I mean, I can do this with each one
18 of these counsel on the phone if we all set up time to talk,
19 which I have done with a few. This won't be a -- and I may
20 extend something formally out to the joint defense group and
21 get that going.

22 I didn't find -- the claims won't be a problem.
23 Putting it in the Complaint, kind of is a touchy thing.

24 THE HONORABLE JUDGE DONOVAN FRANK: I am not
25 concerned about the complaint. Let me ask counsel a

1 question. I think I can resolve this today, quite simply.

2 Let me ask you about the February 1st date. Did
3 any of you know, or did you say, no, no, we have to check
4 back? What is the likelihood of that date working for some
5 or all of you?

6 MR. FLOREY: Good more me, Your Honor.

7 MR. WILLIAMS: And for me, Your Honor.

8 MR. LEE: It would work, Your Honor.

9 MR. HILL: Fine.

10 MR. WILLIAMS: February 1st.

11 MR. ARNETT: I think we can have that covered.

12 THE HONORABLE JUDGE DONOVAN FRANK: Do you need to
13 give her an update on the car situation?

14 MS. MERRIETT: He'll wait.

15 THE HONORABLE JUDGE DONOVAN FRANK: What?

16 MS. MERRIETT: I tip well. He waited for me. On
17 the way here I tipped him --

18 THE HONORABLE JUDGE DONOVAN FRANK: Here, I think,
19 the solution here is simpler, ironically. It won't be maybe
20 down the road. But, in an MDL case like this where unlike a
21 non-MDL, it is not necessarily the case where we are meeting
22 every month. It seems to me that you have had some
23 representations from counsel, and I will go back to what I
24 said earlier. She says she believes she can deliver what
25 you each need. Either she will or she won't. And either we

1 will agree or disagree with that. But, we know one thing
2 for sure, because I think you all agree on one thing, not
3 much else can happen until you focus in on that.

4 We are going to know when we get together on
5 February 1st. That is what we are going to know, because we
6 are going to be back together here. Some of you --
7 hopefully many of you will be here, some of you may be by
8 phone. We are going to be back here on that date, and of
9 course you know that we are hoping and insisting we are
10 going to meet every month thereafter.

11 So, you are either going to come in here and say,
12 we've got what we need and here are the issues. Or you are
13 going to come in, one or more of you, and say, we are right
14 where we were back on December 15th, and then we will make a
15 decision in the case.

16 THE HONORABLE MAGISTRATE JUDGE RAU: And let me
17 just say with respect to those monthly meetings, I have had
18 one piece of very large litigation involving insurance
19 coverages that had this many lawyers representing this many
20 different insurers, on a column of insurance. A day before
21 these meetings we are going to get a letter, a short letter
22 from the defense side or from a couple of defense lawyers
23 and from the plaintiffs' side saying this is what we need to
24 talk about, this is what we agree on, this is what we don't
25 agree on, this is what we want you to resolve. Every single

1 month.

2 THE HONORABLE JUDGE DONOVAN FRANK: And we will
3 keep it so there is no confusion, especially so we can get
4 plaintiffs' counsel out of here. I will draft a short order
5 putting this together just like that. And so that there
6 won't be any confusion about, well -- and it will address
7 getting a short letter. I will put the word short in
8 briefs, or in quotes -- briefs, that didn't come across
9 right. So, I will get that out early next week.

10 And I won't make any claim there is a stipulation
11 on anything, so there will be no prejudice to anybody. So,
12 the expectations will be clear. And in the highly unlikely
13 event that one or more of you say, well, this Order doesn't
14 square with what happened back on December 15th, again, the
15 worst case scenario isn't very bad, then I suspect one of
16 you will call up and say, we need a global telephone
17 conference for five minutes. I promise you, that won't be
18 necessary. That is what I would suggest.

19 We will cut the order. I will take counsel at her
20 word. She is going to do her best to deliver on this. And
21 then she will either think she has done so, and you will
22 think she has, or one of you will think the other hasn't
23 been reasonable. But, we are all going to hear about it on
24 February 1st. That is one of the advantages.

25 And we will start then, the meeting, for an hour

1 off the record in chambers, moving into the courtroom. And
2 for those people participating on the phone today, we will
3 go to -- we will consider just what role and what is fair
4 for them in terms of how they participate in that. So --

5 MR. WILLIAMS: Your Honor, I would submit on
6 behalf of the defendants, without having had an opportunity
7 to talk to them all, we would be more than willing to submit
8 to the Court two weeks in advance of that hearing sort of an
9 informal status report as to where we are in this give and
10 take progress at that point in time, so that we don't
11 surprise you a day before or two days before with, you know,
12 problems in the letter.

13 THE HONORABLE MAGISTRATE JUDGE RAU: Well, don't
14 be too ambitious about the two weeks, because I want you to
15 do a meet and confer before you give us any status report.

16 MR. WILLIAMS: We will be meeting and conferring,
17 Your Honor, often before then.

18 THE HONORABLE JUDGE DONOVAN FRANK: And I will
19 draft the order and put a couple of timelines in so nobody
20 has to hit the panic button. Then we will discuss any
21 interest in early settlement, early identification of
22 dispositive issues that would help one or more of your
23 respective clients. And we will talk seriously about a
24 proposed case -- initial case management order to get this
25 case moving down the road.

1 I will be calling Judge Lynn about the seal order.
2 And if one or more of you say, so we can get you heading out
3 the door, that well, there's a couple of issues that would
4 be really crucial for the Court to address or have us
5 prepared to address on February 1st, then as long as the
6 other party gets notice, we don't get into a letter war back
7 and forth, let the other party know and say, let's apprise
8 the Judge of this, and we will take it from there.

9 But then we will get together, set it at, say,
10 9:00 in my chambers. To move to the courtroom at 10:00 on
11 that date. And then in the unlikely event, well, there is
12 no reason to move it to the courtroom. Nobody on the street
13 is demanding to participate, then I will bring my court
14 reporter into my chambers, which is in the front corner
15 office of this building. So --

16 Now, who have I cut off and frustrated? You have
17 to head out the door. Some of the defense counsel? And you
18 are free to stay in here as long as you like and talk with
19 one another.

20 MS. MERRIETT: Well, I can -- there's other
21 planes.

22 MR. LEE: Well, Your Honor, we have hearings set
23 for the 24th on our Motion to Dismiss. We are happy to
24 continue that, again, along with the responsive briefing,
25 and otherwise just take -- we don't want to take them off

1 the docket, per se, but we are happy to continue the
2 hearing, as well as the briefing.

3 THE HONORABLE JUDGE DONOVAN FRANK: Why don't we
4 give this a go first with my promise to you we will give it
5 calendar priority so you don't go to the back of the line.
6 And if that doesn't seem fair, then you should tell me. But
7 we could do it that way.

8 MR. LEE: No problem.

9 THE HONORABLE JUDGE DONOVAN FRANK: I will try to
10 put all of this into a short order so that there is fair
11 notice to everyone. So, if there is an issue about, whoa,
12 wait a minute, then you will know long before even the
13 middle of January. Because I will cut that order the
14 beginning of next week.

15 You better head out the door, Counsel, and I don't
16 know if the driver is going to race you down Shepard Road,
17 and I hope that you --

18 MS. MERRIETT: I thought it was going to be cold
19 here, and it is not even cold.

20 MR. WILLIAMS: My bad. I promised bitter cold and
21 snow.

22 THE HONORABLE JUDGE DONOVAN FRANK: We will
23 deliver on that before the next few months are out, I'm
24 certain.

25 MS. MERRIETT: I will be better next time.

1 MS. CIANO: In February it will be much colder.

2 MS. MERRIETT: Oh, it will be much colder? Well,
3 great. I will be better about the logistics, you know. I
4 just saw the agenda as simple and I thought it would be
5 doable. And I will make better --

6 THE HONORABLE JUDGE DONOVAN FRANK: Well, I do
7 have a reputation for talking too much, so I don't know if
8 that was the cause of today, but -- so, all right? Safe
9 travel, happy holidays.

10 MS. MERRIETT: Same to you. Thank you, Judge.

11 THE HONORABLE JUDGE DONOVAN FRANK: And I suspect
12 we shouldn't have continued discussion without counsel here,
13 so we will --

14 MS. MERRIETT: I am confident if there are small
15 issues that my local counsel --

16 THE HONORABLE JUDGE DONOVAN FRANK: Why don't you
17 head out the door, and then we will just finish up, here.
18 But on the record I will ask your co-counsel, here, but we
19 will promise not to do anything substantive like dismiss the
20 case or something.

21 MS. MERRIETT: Thank you, Your Honor.

22 THE HONORABLE JUDGE DONOVAN FRANK: Safe travels.

23 MS. MERRIETT: See you guys later. Thank you.

24 MR. WILLIAMS: Travel safely.

25 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Williams

1 or other counsel, would you like to --

2 MR. WILLIAMS: I believe there was one other
3 thing?

4 MR. FLOREY: There was one. Your Honor, just in
5 the interest of, again, advising the Court of an issue that
6 is coming down the pike. So, I represent an equipment
7 manufacturer, Xata, which you have heard.

8 THE HONORABLE JUDGE DONOVAN FRANK: Right, oh,
9 yes.

10 MR. FLOREY: And many of my other clients are
11 simply Xata customers.

12 THE HONORABLE JUDGE DONOVAN FRANK: Right.

13 MR. FLOREY: They are trucking companies who
14 bought our product and put it on their truck and they are
15 running down the road. There is a fairly well-developed
16 body of patent law that where you have a situation where in
17 one case someone is suing a manufacturer, and customers who
18 are simply using that accused product, that you stay the
19 customer cases, and simply proceed --

20 THE HONORABLE JUDGE DONOVAN FRANK: That is true.

21 MR. FLOREY: -- against the manufacturers.

22 THE HONORABLE JUDGE DONOVAN FRANK: Without
23 agreeing to do it, that is true.

24 MR. FLOREY: Right. So, I do -- I want to advise
25 you, it is our intent, and I believe it also may be the

1 intent of some other defendants to file a motion to stay the
2 cases that are purely against customers.

3 THE HONORABLE JUDGE DONOVAN FRANK: Well, it
4 seems, not to interrupt -- but I guess that is what I have
5 done. It seems to me that is one of the issues, and maybe
6 you already know the answer, and that is why you brought it
7 up, that that is what the meet and confer does. Because in
8 a majority of cases that would -- especially when it is not
9 interfering with the rest of the case.

10 I would be surprised if there couldn't be some
11 meeting of the minds on those issues, unless there is some
12 unidentifiable issue of prejudice, because that is a fairly
13 common thing to occur in a case.

14 So, I would think that that should be -- I would
15 suggest this, without trying to cause more delay. That
16 should be on the front burner and we will put that on the
17 agenda for the February 1st meeting to say, well, either
18 there has to be -- either reach an agreement or -- one of
19 the things I had hoped to do is, without cutting corners or
20 violating any of the rules, to expedite things with an MDL.
21 One of the values of meeting and having an agenda is without
22 formal motion practice, we don't make it too informal, but
23 that didn't become a problem. I don't want to keep
24 repeating what we did in Guidant, but nobody really felt
25 they were treated unfairly, saying, well, look it, if we

1 could have some expedited process that applies equally to
2 both sides. We don't have to file formal motions with X
3 number of days. We were almost always to work that out, so
4 that even if the parties couldn't agree on an issue, they
5 could get it in front of me expeditiously so you could get a
6 decision, so you don't have the normal, all right, that is a
7 42-day swing again with the delays, with briefing. I think
8 we can come up with something. We will put that on the
9 agenda for the February 1st date.

10 MR. FLOREY: Thank you. We are very -- I think I
11 can speak on behalf of the defense group that we are very
12 amenable to informal resolution of many of these items.
13 Thank you, Your Honors.

14 THE HONORABLE JUDGE DONOVAN FRANK: The only
15 danger to the informal resolution that never really came to
16 pass in my judgment, and it doesn't when you have good
17 experienced lawyers involved, whether it is an MDL or
18 non-MDL, is if the judge becomes the enabler. So they say,
19 well, we don't have to talk to each other. We will just
20 toss it in front of the judge and he will go up or down.
21 That doesn't have to happen. That would be a reason not to
22 have a more expeditious process, but that rarely happens.
23 So, if you could pass that on to your co-counsel, I would
24 appreciate that.

25 MS. CIANO: I will, Your Honor.

1 THE HONORABLE JUDGE DONOVAN FRANK: And then we
2 will discuss with you the issue of -- without forcing the
3 issue, of the pros and cons of early settlement on issues
4 and identification -- is it going to benefit anyone to
5 have -- is there some limited or other discovery to do and
6 some big ticket items that we could get in front of me early
7 on in the case that would help resolve or focus the case
8 that would benefit everyone without any significant
9 prejudice? We will discuss that, as well, on the 1st of
10 February. Because we are going to be rather insistent that
11 shortly thereafter an initial case management order get in
12 place.

13 And frankly speaking, the order I will produce no
14 later than early next week will suggest that people come in
15 with a proposed -- give me an idea of what they agree on and
16 a proposed schedule.

17 And then if some of you are saying, well, let's
18 wait and see if we can get the background on this, the claim
19 contention, like we said, it's worst case scenario is an
20 additional 30 days delay. We will move things along. It
21 won't be my schedule that will keep you from moving things
22 along.

23 So, that is kind of the promise we make to the MDL
24 Panel when we agree to take a case. So, let's leave it
25 there, unless I have cut somebody off. Anybody have

1 something they want to --

2 (No response.)

3 I can't promise it will be up next week, but we
4 will get something on our website, as well, get that up and
5 running in the MDL section of our website.

6 And anything further on behalf of any of the
7 defendants at this time?

8 MR. WILLIAMS: No, I don't believe so, Your Honor.
9 We thank you, Your Honor.

10 THE HONORABLE JUDGE DONOVAN FRANK: So, when we
11 meet at 9:00, and I will put that in the order, it will be
12 designed to meet in chambers. And, of course, I have the
13 same rule as the lawyers would expect, that if anything is
14 said back there, because my court reporter won't be --
15 Jeanne won't be there unless we at some point say: Okay,
16 let's go on the record, no need to go in the courtroom.
17 But, I want to make sure that the hearing is open for
18 anybody who wants to come in. However, when it comes to
19 chambers, then we will discuss any issues of lead and
20 liaison counsel, if there are any, as well, because at least
21 in my Guidant case, I won't name one or two of the lawyers,
22 and they weren't local attorneys, but some lawyers would try
23 to come in uninvited to the meeting and we would have to
24 politely, of course, tell them -- and it is not likely that
25 is going to happen here. But, we will either meet in my

1 chambers, or the main conference room for the whole court in
2 this building is right next to my chambers. So, everything
3 is here on seven. So, one or the other, we will do so.

4 Anything on behalf of you or co-counsel?

5 MS. CIANO: Nothing else on behalf of plaintiffs,
6 Your Honor.

7 THE HONORABLE JUDGE DONOVAN FRANK: All right.
8 Any other questions anybody has?

9 MR. WILLIAMS: Thank you, Your Honor.

10 THE HONORABLE JUDGE DONOVAN FRANK: Feel free to
11 call Ms. Schaffer. And Judge Rau and I will keep you
12 informed and we will do our best to proceed in a fair manner
13 for all of you.

14 And for those of you still on the phone, of the
15 seven of you, we will keep you informed, as well. And I
16 thank you for participating in the hearing this afternoon.
17 Maybe they have all left?

18 UNIDENTIFIED VOICE ON THE TELEPHONE: Thanks, Your
19 Honor.

20 UNIDENTIFIED VOICE ON THE TELEPHONE: Thank you,
21 Your Honor.

22 THE HONORABLE JUDGE DONOVAN FRANK: We wore you
23 down. Thank you. We are adjourned. Thank you.

24 MR. WILLIAMS: Thank you.

25 (Adjournment.)

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3 I, Jeanne M. Anderson, certify that the foregoing
4 is a correct transcript from the record of proceedings in
5 the above-entitled matter.
6
7

8 Certified by: s/ Jeanne M. Anderson
9 Jeanne M. Anderson, RMR-RPR
10 Official Court Reporter
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